
United States 2
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of DAVID A. JACOBSON, Bankrupt.
KATIE WERNER,
Petitioner,

VS

HOMER F. ALLEN, as Trustee of the Estate of
DAVID A. JACOBSON, Bankrupt, PHOENIX
SAVINGS BANK AND TRUST COMPANY, a cor-
poration, and NORTHERN TRUST COMPANY, a
corporation.

Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, an Order of
the United States District Court for the
District of Arizona, and Transcript
of Record in Support Thereof

Petitioner's Brief

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STATEMENT OF THE CASE

On July 31, 1923, David A. Jacobson was duly adjudged to be a bankrupt by the District Court of the United States for the District of Arizona, and the cause was referred, generally, to R. W. Smith, a referee in bankruptcy in said district. Thereafter the respondent, Homer F. Allen, was appointed trustee of said bankrupt's estate. (T. R. pp. 11,—13)

At the time of adjudication the bankrupt was the owner of certain real property, including lots No. 25, 26, 27, and 28, Town of Chandler, Maricopa County, Arizona. On November 20, 1923, the trustee petitioned the referee for an order to sell all the bankrupt's real property, free and clear of all liens and encumbrances, conditioned upon the price obtained at trustee's sale being sufficient to pay all of said liens and encumbrances, same to be transferred to the fund derived from the sale. (T. R. pp. 13—28)

The trustee's petition further prayed for an order upon Katie Werner, petitioner herein and the holder of second mortgage liens upon said lot 25, and lots 26, 27, and 28 of the Town of Chandler, above described, and upon the other holders of liens against bankrupt's real property to show cause why the petition should not be granted and the order of sale prayed for made. On November 21, 1923, the referee made an order directing the lien holders, including Katie Werner, to appear on December 3, 1923, and show cause, if any they had, why an order of sale, free and clear of liens and encumbrances, conditioned upon the sale price being sufficient to pay all of the liens against the real property, should not be made. (T. R. pp. 28—31)

Hearing was had and completed before the referee on the trustee's petition and the order to show cause on December 3, 1923. In response to the order to show cause, Katie Werner appeared at this hearing by counsel, but entered no objection to the making of the order as prayed for. No order of sale, nor any other

order was made on said petition on December 3, 1923, but on December 18, 1923, without further notice to Katie Werner, or other lien holders, the referee made, signed and filed an order authorizing the trustee to sell, within ninety days from Nov. 10, 1923, bankrupt's real property, including lots 25, 26, 27, and 28, above described, free and clear of all liens and encumbrances, without any condition, whatsoever, as to what the minimum sale price should be. This order explicitly directed that the sale of the real property should be at public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States. (T. R. pp. 32—38)

Later the trustee published, in two newspapers, a notice that on Feb. 7, 1924, he would sell the real property, describing it, to the highest bidder for cash, said sale to be held in his office, Rooms 411-412, National Bank of Arizona Bldg., Phoenix, Arizona. The notice stated that a deposit of ten percent must accompany each bid, that the sale was to be subject to confirmation by the Bankruptcy Court and that the right was reserved to reject any and all bids. No other notice of sale, whatsoever, was given. (T. R. pp. 39—40)

No public sale of said real property was had or held on Feb. 7, 1924, and no sale of same whatever was ever had or held at Rooms 411-412, National Bank of Arizona Bldg., Phoenix, Arizona, as advertised by the trustee. However, on that day, without any previous notice to the public or any one else, and without any

adjournment of the sale, the trustee and one Arthur E. Price, the attorney of record for the respondents, Phoenix Savings Bank and Trust Company and Northern Trust Company, holders of first mortgage liens on lot 25, and lots 26, 27, and 28, above described, respectively, repaired to the office of the referee, R. W. Smith, at Room 208, Heard Building, Phoenix, Arizona, where at 10 o'clock in the morning of that day the trustee sold lot 25, to Phoenix Savings Bank and Trust Company, and sold lots 26, 27, and 28, to Northern Trust Company, for purchase prices sufficient only to pay the first mortgage liens thereon, and the costs and expenses of said trustee's sale, and wholly insufficient to pay Katie Werner anything on her second mortgage liens on said real property.

(T. R. pp. 39—47)

On March 3, 1924, the trustee made his return of said sales, showing the facts relative to same as above stated, and, without notice to any one, the referee confirmed the sales and ordered the trustee to pay the amounts of the first mortgage liens to the above named purchasers, respectively, and the expense of sale, referee's and trustee's commissions and the fee of the trustee's attorney. (T. R. pp. 47—54)

On October 13, 1924, the purchase price at the trustee's sale of said lots 25, 26, 27, and 28, not yet having been paid, nor the property transferred to said Phoenix Savings Bank and Trust Company and Northern Trust Company, this petitioner filed with the referee, and served on the trustee and Phoenix Savings

Bank and Trust Company, and Northern Trust Company, a petition to set aside the referee's order of sale dated December 3, 1923, the trustee's sale of said lots 25, 26, 27, and 28, and the referee's order confirming the sale, requesting in her petition, that said respondents be ordered to answer and show cause, if any they had, why said petition should not be granted. The referee refused to issue the order to show cause and on November 8, 1924, without answer or appearance by the respondents and without hearing the petition or taking the petitioner's evidence in support thereof, dismissed it for want of jurisdiction. (T. R. pp. 54—65 and 67—69)

On November 17, 1924, Katie Werner filed in the District Court of the United States for the District of Arizona, her petition for review of the acts and order of the referee under said date of November 8, 1924, said petition being duly served upon all of the respondents herein. (T. R. pp. 71—74 and 75—76)

None of the respondents filed answer to the petition for review, but the matter coming on before the District Court on December 8, 1924, for argument, said District Court, Honorable F. C. Jacobs, Judge, on Dec. 9, 1924, made and entered his order denying the petition for review and confirming the referee's order confirming the sales, to which ruling of the District Court your petitioner duly excepted. (T. R. pp. 77—78)

The matter is now before this Honorable Court on the verified petition of Katie Werner to superin-

tend and revise the order and decree of the District Court of the United States for the District of Arizona, so made and entered on Dec. 9, 1924. (T. R. pp. 1—11)

QUESTIONS INVOLVED

Disregarding the novel and arbitrary procedure of the referee in summarily refusing this petitioner her right to be heard on her petition to set aside the order of sale and the sale itself, and to place before the court all of the facts relative to matters alleged therein, the basic questions involved are:

(1) Did the referee have jurisdiction to make the order of sale free and clear of liens and encumbrances not conditioned on the price obtained at trustee's sale being sufficient to pay the liens of the petitioner, when she had been summoned on a petition for, and ordered to show cause why an order to sell the property, conditioned upon the purchase price being sufficient to pay all of the liens on the property, and no other order, should not be made?

(2) Is the sale by the trustee of the real property of the bankrupt, without notice to creditors of such proposed sale, valid?

(3) Is the sale by the trustee of the real property of the bankrupt, at 10 o'clock in the morning of the day for which the sale had been advertised, and at different place from where the public had been informed same would take place, without adjournment or notification to the public of any change in the time or place

of sale, and without giving the public any opportunity to bid, a public sale, valid under an order for sale at public auction and under the General Orders of the Supreme Court of the United States?

SPECIFICATIONS OF ERROR.

(1) The District Court erred in confirming the action of the referee in confirming the sale, for, as a matter of law, the sale was made under an order which the referee had no jurisdiction to make. Katie Werner was brought into the Bankruptcy Court on an order to show cause why an order of sale, for a price sufficient to pay all liens and encumbrances, should not be made, and for no other purpose. The only jurisdiction obtained by the referee was to make or refuse to make an order for sale based on the trustee's petition and such order to show cause, and no other. (T. R. pp. 8 (b) 8-9)

(2) The District Court erred in confirming the action of the referee in confirming the sale for, as a matter of law, the sale by the trustee was void in that the order under which it was made provided that the sale should be at public auction in the manner and mode as prescribed by the Acts of Congress of the United States, whereas the sale was in fact a private sale and held at a place other than specified by the trustee, without due and lawful postponement or adjournment thereof. No notice of any proposed sale was given to creditors as provided by the Bankruptcy Act. (T. R. p. 9 (c))

(3) The District Court erred in denying the petition

of Katie Werner for review and in not setting aside the order of the referee dated Dec. 3, 1923, directing the sale of lots 25, 26, 27, and 28, of the Town of Chandler, free and clear of liens and encumbrances, and in not setting aside the sales of said lots by the trustee to the respondents, Phoenix Savings Bank and Trust Company and Northern Trust Company and the order of the referee of March 3, 1923, confirming said sale. The order of sale and the sale itself were void for the reasons stated in assignments of error Nos. 1 and 2, and Katie Werner was deprived of her lien on said real property without due process of law. (T. R. pp. 8-10)

ARGUMENT AND AUTHORITIES

On Assignment of Error No. 1

There can be no doubt of the power of the Bankruptcy Court to sell the property of the Bankrupt free and clear of liens and encumbrances, the liens to be transferred to the fund derived from said sale. However, as the trustee takes no title to the interest of the lien claimant, that interest cannot be divested without the consent of such holder or proper notice given him. In order to bind such a lien holder by a sale free from encumbrances he must be made a party to the bankruptcy proceedings by being served with proper process.

Factors' & Traders' Ins. Co. v. Murphy et al, 111 U. S. 738; 4 S. Ct., 679, at page 681.

In re Platteville Foundary & Machine Co., 147 Fed. 828, at page 830.

In the present case, jurisdiction was obtained over Katie Werner and her lien by the service upon her of the trustee's petition for sale and an order to show cause why such sale should not be made. The petition prayed for an order

"Authorizing and directing Homer F. Allen, Trustee in Bankruptcy of David A. Jacobson, to sell lots 25, 26, 27, 28, 36, 37, 38, and 39, of the Town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances * * *, conditioned upon the purchase price at a Trustee's Sale of said property and of lots 25, 26, 27, 28, 36, 37, 38, and 39, being sufficient to pay all of the liens against all of said property * * *." (T. R. p. 26)

And the order served upon her directed her and other lien holders to

"Be and appear before the undersigned referee in bankruptcy on the 3rd day of December, 1923, at 10 A. M., then and there to show cause, if any they may have, why the prayer of the petition hereinbefore referred to should not be granted, and why an order should not be made and entered authorizing and directing Homer F. Allen, trustee in bankruptcy of David A. Jacobson, to sell lots 25, 26, 27., 28, 36, 37, 38, and 39, Town of Chandler, Maricopa County, Arizona, free and clear of all liens and encumbrances, the liens now existing upon said property to be transferred to the proceeds derived from a sale thereof; * * * conditioned upon the purchase price at trustee's sale of said property and of lots 25, 26, 27, 28, 36, 37, 38, and

39, being sufficient to pay all of the liens against all of said property." (T. R. pp. 29—30)

That the service of an order to show cause is the proper method of bringing the lien claimants into the Bankruptcy Court cannot be questioned. In *Kuntz vs. Young*, 131 Fed. 719, at page 722, the United States Circuit of Appeals for the Eighth Circuit stated,

"An order to show cause why a certain act should not be done or a certain course pursued is the regular and approved method of giving notice of contemplated action to parties to suits and proceedings in equity and bankruptcy",

if the terms of the order are sufficiently broad to give notice of the order or decree entered. The same court in *In re E. A. Kinsey Co.*, 184 Fed. 694, (last paragraph) referring to proceedings for a sale in bankruptcy, free and clear of liens and encumbrances, held,

"As to the other question whether the court could bring the petitioner before it by service of a rule to show cause why the petition should not be granted, we entertain no doubt.",
but thereafter stated,

"The essential feature of mesne process is that the respondent shall have notice of the claim the establishment of which may effect his interest and of the time and place for hearing."

In the case at bar, the only purpose for which Katie Werner was made a party to the proceedings was to either consent or enter her objections

to the making of an order to sell the property, free and clear, for a price sufficient to pay her lien in full and, under the process served upon her, the only jurisdiction obtained by the referee was to make or refuse to make such an order. She had no notice that any other would be made and was given no opportunity to object to or show cause why any different kind of an order should not be made.

The order actually made by the referee was that
"Homer F. Allen Esq., as trustee of David A. Jacobson, bankrupt, be and he is hereby authorized, directed and permitted to sell and dispose of, at public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, within ninety days from and after the 10th day of November, 1923, all of the real property hereinafter specifically described free and clear of and from all liens and encumbrances described in said petition and in said order to show cause and as appears of record against said property * * * and that said proceeds of and from the sale of the said real property be held by said trustee subject to all the liens and encumbrances against said property * * *." (T. R. pp. 35—36)

This order was an entirely different order from that contemplated by the trustee's petition and the order to show cause, and greatly adverse to petitioner's interests. Katie Werner interposed no objection to the trustee's petition for the reason that she could have and did have no objection to the order prayed for being made, but it could in no wise be contended that

she would not have objected if she had been summoned to answer a petition for a sale without the condition that the price was to be sufficient to pay her lien in full.

The order of sale made by the referee, being in excess of his jurisdiction under the pleadings and process in the particular proceedings, was invalid, as were also all of the steps taken thereafter by the trustee toward the sale of the property. That an order made without jurisdiction is void and not merely voidable is too elementary to necessitate the citation of authorities.

Katie Werner had no opportunity to object to the order of sale as made, because of the procedure of the referee in making, signing and filing it on Dec. 18, 1923, but dating it Dec. 3, 1923. (T. R. p. 28) A reasonable time for review had already expired even before the order was actually made and she had no knowledge of it until much later. The sale having been made under a void order the District Court had no power to confirm it.

ON ASSIGNMENT OF ERROR No 2.

The order of the referee under which the trustee sold the property involved herein, was that the sale should be

“* * * At public auction and in the manner and mode as prescribed by the Acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, * * *” (T. R. p. 35)

and the General Orders of the Supreme Court of the United States provide,

"All sales shall be by public auction unless otherwise ordered by the court."

General Order in Bankruptcy XVIII, Sub. 1.

The only valid sale possible in the case at bar would be one at public auction. Not only is the General Order cited mandatory and susceptible of only one interpretation, but a sale by a trustee in bankruptcy is a judicial sale, and must comply strictly with the order of sale.

In re Glas-Shipt Dairy Co. 239 Fed. 122;

Blanke Mfg. Co. v. Craig 287 Fed. 345.

In the latter case the United States Circuit Court of Appeals for the Eighth Circuit, referring to a sale in bankruptcy, held, in the last Paragraph on page 347:

"The general considerations governing judicial sales apply in confirmations of sales made by the trustee and such require the sale be in conformity with the terms of the order of sale."

The only notice of sale given by the trustee; that published as shown in his return of sale, stated that, on Thursday, February 7, 1924, he would sell the property to the highest bidder for cash, said sale to be held in his office, Rooms 411-412, National Bank of Arizona Building, Phoenix, Arizona. This notice fixed no time for the sale on that date and that cir-

cumstance alone would tend to prevent the attendance of possible bidders. (T. R. pp. 39—40)

While the petition of Katie Werner to the referee to set aside the sale, alleges that the property was sold by the referee and that there was no sale, or offering for sale by the trustee at the latter's office on the date set, or at any other time, and those allegations, being uncontroverted, must be taken as true; the trustee's return itself shows that the sale of the property in question was not a public sale. At some time prior to 10 o'clock on the date the public had been notified the property would be sold, the trustee and the attorney for the respondents, Phoenix Savings Bank and Trust Company and Northern Trust Company, without any attempt to adjourn the sale to a place other than the advertised one, or to notify the public that the sale would be held elsewhere, went to an office in a different part of the city of Phoenix than the place where the trustee's office is located and there, after the bid had been made and the whole matter apparently cut and dried, and a few parties requested to be present by telephone, the property was at 10 o'clock A. M. sharp, sold to said respondents for a price much below its actual value and insufficient to pay all of the liens. (T. R. pp. 40—41 and 45—46)

The public was in no way notified that the sale would be held at Room 208, Heard Building, or at that early hour in the morning, but on the contrary was informed that the sale would be at Rooms 411-412 National Bank of Arizona Building; with the impres-

sion left that the sale would last all the day of Feb. 7, 1924. The public was given absolutely no opportunity to bid on the property, for it could not and did not know when and where the property was to be sold. In other words, the action of the trustee and the purchasers absolutely prohibited a sale by free, open and public bidding; and this in face of the fact that numerous persons were interested in the sale of this property, had made investigations thereof and were prospective bidders at a public sale. (T. R. pp. 41, 46)

The public having had no opportunity to bid for the property, the trustee's sale was not a public sale but was a private one.

In re Nevada—Utah Mines and Smelters Corporation, 202 Fed. 126,

wherein the United States Circuit Court of Appeals for the Second Circuit, at page 128, stated,

“That the public be invited to attend and bid, is the essential feature of a public sale.”

and held that the sale in bankruptcy in that case was a private sale because the published notice was addressed to the creditors, stockholders and other parties in interest and not to the public.

The sale being a private sale in direct contravention of the General Orders in Bankruptcy and the order of the referee under which it was made, it is void and the District Court had no power to confirm it.

Blanke Mfg. Co. v. Craig, 287 Fed. 345, supra;
Seminole Fruit & Land Co. v. Scott et al, 291
Fed. 179.

'Creditors shall have at least ten days notice by mail, to their respective addresses * * * of * * * all proposed sales of property.'" Sec. 58, Bankruptcy Act of 1898.

As shown by the record, no such notice of the sale in question was given. Notice to the creditors being a condition precedent to a valid sale, this sale is invalid for that reason also.

ON ASSIGNMENT OF ERROR No. 3.

Of necessity, much of our argument under assignments of error Nos. 1 and 2, must apply to this assignment. The action of the District Court in denying Katie Werner's petition for review was an affirmance of the referee's procedure in refusing her the right to place before the court all of the facts relative to the sale by the trustee. As stated by the United States Circuit Court of Appeals for the Second Circuit:

"* * * The power to displace liens is a drastic one, and should be exercised only with scrupulous attention to securing the lienor specific notice and full opportunity to protect his interest."

In re Kohl-Hepp Brick Co., 176 Fed. 340, at page 343.

And upon the filing of a verified petition alleging that she had not secured such specific notice and

such protection of her interest, she should have been granted a hearing and allowed to submit full proof of such allegations. However, the record in itself shows that the sale was void for the reasons hereinbefore stated and the District Court should have set it aside on the record alone.

Even if it could be contended that the referee had jurisdiction to make the order of sale and that the sale was a public one, and we submit that such contentions would be absolute untenable, the object of the sale in question, under the order of the court, (to use the words of the District Court in *In re Ethier, et al*, 118 Fed. 107, at page 108) was, to obtain the best price for the property, through open and unrestricted bidding. The conduct of the trustee and purchasers prevented the accomplishment of that object and vitiated the sale, and it must be set aside, as was done in the *Ethier* case.

“ * * * any act of * * * the party selling, or third parties as purchasers, which prevents a fair, free, and open sale, or which diminishes the competition and stifles or chills the sale”, is cause for setting same aside.

Swain v. Kirkpatrick Lumber Co., 78 So. 140, 20 A. L. R. 665, at page 671.

The fact that the sale had been confirmed by the referee, prior to the filing of Katie Werner's petition to set it aside is immaterial, for a court cannot confirm a void act. The sale in this case was void and

not merely voidable, being made under an order beyond the jurisdiction of the referee and in absolute contravention of that order. Furthermore, a court of equity will, for cause, set aside a sale made under its authority either before or after confirmation.

In re First Trust Etc. Bank, 45 Mont. 89, Am. Cas. 1913 C., page 1327.

In re Stevenson et al, 6 Fed. 710.

In re Shea, 126 Fed. 153.

And a judicial sale may be set aside at any time or subjected to collateral attack, where the court had no jurisdiction to order it, or for any other reason it is entirely void.

16 R. C. L. page 102.

There is no merit to the referee's theory that he had no jurisdiction to entertain the petition to set aside the sale, for, if a court has the power to order a sale it has the inherent power to set such sale aside. After reference, the referee is the court.

In re Styer, 98 Fed. 290.

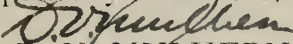
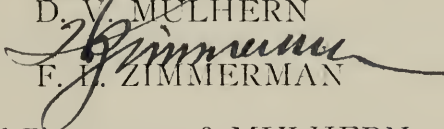
The order of sale being void for want of essential notice to this petitioner as set forth in argument under assignment of error No. 1, the effect of the District Court's refusal to set the sale aside was to deprive her of her lien on the property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. For

“the fundamental requisite of due process of law is opportunity to be heard.”

Grannis v. Ordean, 234 U. S. 385, 34 S. Ct. 779, at page 783.

WHEREFORE, Katie Werner prays that the order and ruling of the District Court of the United States for the District of Arizona, dated December 9, 1924, be reversed and that the order of sale, the sale and the orders confirming the sale made by the trustee in bankruptcy of said lots 25, 26, 27, and 28, of the Town of Chandler, Maricopa County, Arizona, be set aside.

Respectfully Submitted,


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For Petitioner.

